Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Digital Broadcast Copy Protection	)	**MB Docket No. 02-230**

REPLY COMMENTS OF WORLDCOM, INC.

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INTRODUCTION

WorldCom submits these reply comments in connection with the Commission's Notice of Proposed Rulemaking ("NPRM") In re Digital Broadcast Copy Protection, M.B. Docket No. 02-230 (rel. Aug. 9, 2002). WorldCom has two principal concerns. First, in the absence of express Congressional authorization, it is questionable whether the Commission's rulemaking authority extends to copyright protection issues. Because Congress has not given the Commission clear guidance to regulate digital broadcast issues that will directly impact the Copyright Act, the Commission should defer to the authority of the Copyright Office, which is the body with recognized expertise in the area of copyright, and which Congress has designated to promulgate rules and regulations related to the copyright laws, unless and until Congress directs the Commission to act in this area.

Second, as an Internet service provider ("ISP") and Internet network operator, WorldCom has a substantial interest in regulations imposed on the Internet. If the Commission determines that it should promulgate regulations governing digital copyright protection, WorldCom urges the Commission to state explicitly that those regulations do not extend to Internet networks and ISPs. Application of this rulemaking to the Internet would unjustifiably enlarge "the limited sphere of digital broadcast television" which this rulemaking is intended to cover.[1] Internet network operators, including WorldCom, were not included in the Broadcast Protection Discussion Subgroup, which has espoused the broadcast flag standard. Moreover, extension of the proposed rulemaking to ISPs and Internet network operators is unnecessary because Congress has already established the copyright protection obligations of ISPs.[2]

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[1] NPRM ¶ 3.

[2] *See* Digital Millennium Copyright Act, 17 U.S.C. § 512.

DISCUSSION

WorldCom files these comments in response to the comments of the Motion Picture Association of America, among others, which contend that the Commission has the authority to regulate DTV copyright protection rules,[3] and in response to the comments of the National Music Publishers' Association, which encourages the Commission to include the United States Copyright Office "as an equal partner in any rulemaking proceeding on this subject."[4] In addition, WorldCom files these comments in response to the comments filed by several parties suggesting that the broadcast flag technology may be applied to the Internet.[5]

A. The Commission Should Not Exercise Authority Over Copyright Issues.

The administration of copyright laws is beyond the FCC's scope of authority.[6] "The FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act."[7] Congress may seek the Commission's expertise on an issue that relates to the copyright laws, but as the Commission itself has recognized, "[t]he federal courts

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[3] *See* Joint Comments of the Motion Picture Ass'n of Am., et al., at 29-41 (Dec. 6, 2002).

[4] *See* Comments of Nat'l Music Pubs. Ass'n, at 6 (Oct. 30, 2002).

[5] *See* Joint Comments of the Motion Picture Ass'n of Am., et al., at 1; Comments of the Nat'l Music Pubs. Ass'n, at 5; Comments of Verizon, at 1-5 (Dec. 6, 2002).

[6] *See, e.g.*, FCC, *The Public and Broadcasting*, 1999 WL 391297, at 12 (June 1999) ("We do not administer copyright laws.").

[7] *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 406 n.11 (1974). The Court further noted that "In 1966 [the FCC] indicated that its proposed rules regulating CATV operations would not 'affect in any way the pending copyright suits, involving as they do matters entirely beyond (the FCC's) jurisdiction.' . . . This position is consistent with the terms of the Communications Act of 1934, ..." *Id.* The decision in *Teleprompter* was superseded on other grounds by the Copyright Act of 1976, 17 U.S.C. § 111.

and the Copyright Office of the Library of Congress are primarily responsible for enforcing and administering the copyright laws."[8]

Because the FCC lacks "a general power to affect copyright law,"[9] it should only make communications policy decisions that directly affect copyright liability if Congress grants it that authority. For example, when Congress enacted the Copyright Revision Act of 1976 to require cable stations to pay a carriage fee when they carried a broadcast station's signal into distant markets, Congress "knew that the FCC would have a role to play in determining the scope of compulsory licensing," and "intended that the Commission's communications policy decisions concerning which signals cable television could carry would affect the copyright liability of cable television companies."[10] Accordingly, Congress made clear that it left particular questions touching on copyright issues to the Commission's discretion, and that its statutory regime "allow[ed] the FCC's communications policy decisions to affect copyright liability."[11] In light of this plain authorization, the Commission was allowed to make decisions impacting copyright liability.

With regard to digital broadcast protection, by contrast, Congress has not made clear whether the Commission is authorized to promulgate rules that directly affect copyright law. Indeed, in connection with this proposed rulemaking on digital broadcast protection, leaders from

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[8] *In re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 13 F.C.C.R. 22,977, ¶ 20 (1998).

[9] *United Video, Inc. v. FCC*, 890 F.2d 1173, 1186 n.8 (D.C. Cir. 1989).

[10] *Id.* at 1184.

[11] *Id.* at 1185-87.

the House and Senate Committees with jurisdiction over copyright have recognized that the FCC lacks express authority over copyright issues: "While Title 47 grants authorities to the FCC in respect of broadcasting, no express authority is provided to address the complex issues of intellectual property matters in general or digital broadcast copy protection in particular."[12] They have therefore cautioned the FCC to "consider whether clearer guidance or an express authorization from the Congress is warranted before engaging in a rule making with respect to issues having a direct impact on the scope and interpretation of the Copyright Act."[13] Similarly, there is apparently at least some doubt among the Commissioners as to whether the Commission has the authority over these matters.[14]

In seeking to establish the Commission's authority to regulate digital broadcast protection rules, the MPAA points to the Commission's past regulation of consumer electronics generally and digital broadcasting in particular.[15] But the MPAA's comments fail to identify a single instance in which the Commission has asserted its authority for the purpose of promulgating copyright protection rules in the absence of a Congressional delegation of authority.

Given that Congress has not delegated the authority to promulgate digital copyright protection rules to the Commission, a more prudent approach would be to defer to the United States Copyright Office, which Congress has designated as the governmental body that

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[12] *See* United States Senate Judiciary Committee letter to FCC Chairman Powell (Sept. 9, 2002).

[13] *Id.*

[14] *See* NPRM at Concurring Statement of Commissioner Copps (noting that "there is not a majority here to resolve the issue of the Commission's authority").

[15] *See* Joint Comments of Motion Picture Ass'n of Am., et al., at 31-35.

administers copyright laws.[16] "[I]t is clear Congress [has] recognized the expertise of the Copyright Office in matters relating to copyright,"[17] and its interpretations of copyright law are entitled to due deference.[18] As a general matter, pursuant to its statutory authority to administer copyright laws, the Copyright Office promulgates rules and regulations related to the copyrights laws, including rules related to digital transmission issues.[19]

Congress reaffirmed the authority of the Copyright Office to administer the copyright laws in the digital age when it passed the Digital Millennium Copyright Act ("DMCA") in 1998.[20] The DMCA addressed a number of significant copyright issues. Most notably, Congress prohibited the circumvention of technological measures that effectively control access to copyrighted works, and prevented tampering with copyright management information.[21] To enforce this prohibition, Congress created civil remedies and criminal penalties for violations of Section 1201.[22]

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[16]*See* 17 U.S.C. §§ 701 & 702; *Schnapper v. Foley*, 667 F.2d 102, 110 (D.C. Cir. 1981).

[17]*See Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 772 (E.D. Pa. 2001).

[18]*See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 610 (D.C. Cir. 1988).

[19]*See, e.g., Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 14,227, 14,227 (Mar. 16, 2000) (seeking comment on whether to amend regulations "to clarify that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability"); *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394 (May 8, 1998).

[20]*See* DMCA, Title IV, Sec. 401(b), amending 17 U.S.C. § 701.

[21]*See* 17 U.S.C. §§ 1201, 1202.

[22]*See* 17 U.S.C. §§ 1203-1204.

But Congress did not assign the Commission the task of promulgating rules and regulations related to the DMCA. Rather, Congress intended that the Copyright Office assume this function: "[A]s is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seek comments from the public, ..."[23] Indeed, as the act's legislative history discloses, Congress expected the Copyright Office to "play a significant role in the implementation of the legislation, particularly with regards to the rulemaking on the circumvention of technological measures that effectively control access to a copyrighted work . . . ."[24]

Accordingly, the DMCA charges the Copyright Office with specific duties related to digital copyright protection issues, including the promulgation of rules to implement 17 U.S.C. § 1201,[25] and directs the Copyright Office to consider "the adequacy and effectiveness of technological measures designed to protect copyrighted works" and the "protection of copyright owners against the unauthorized access to their encrypted copyrighted works."[26]

In sum, given the expertise of the Copyright Office in this area and Congress's intent that the office promulgate rules relating to digital copyright issues, and in the absence of express authorization from Congress for the Commission to regulate copyright, the Commission should

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[23] *See* Digital Millennium Copyright Act, H.R. Conf. Rep. 105-796 at 64, Joint Explanatory Statement of the Committee of Conference (Oct. 8, 1998).

[24] 144 Cong. Rec. S11887-01, S11981 (Oct. 8 1998) (statement of co-sponsor Sen. Leahy).

[25] 17 U.S.C. § 1201(a)(1)(C) & (D).

[26] 17 U.S.C. § 1201(g)(5)(B) & (C).

defer to the expertise of the Copyright Office and should not promulgate rules or regulations pertaining to digital copyright protection.

B. The Commission Should Clarify That Its Proposed Rulemaking Does Not Extend to Cover Internet Networks or ISPs.

If the Commission decides that it does have the authority to promulgate digital broadcast copyright protection rules, WorldCom – an ISP and an Internet network operator with a substantial interest in the growth and regulation of the Internet – urges the Commission to clarify that the rules do not apply to Internet network operators or Internet service providers.

On its face, the NPRM does not purport to propose regulation of Internet networks or Internet service providers. It addresses only "whether a regulatory copy protection regime is needed within the *limited sphere of digital broadcast television*."[27] Nonetheless, the NPRM also seeks "comment on whether and how *downstream devices* would be required to protect . . . content."[28] WorldCom is concerned that this reference to "downstream devices" could be interpreted to include Internet networks, Internet service providers, or the software, equipment and services of Internet service providers. Indeed, several parties have submitted comments suggesting that the broadcast flag technology may be applied to the Internet.[29]

Application of the proposed rules to Internet networks and Internet service providers would be ill-advised. As an initial matter, it would contravene Congress's express goal "to preserve the vibrant and competitive free market that presently exists for the Internet and other

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[27]NPRM ¶ 3 (emphasis added).

[28]*Id.* ¶ 6 (emphasis added).

[29]*See, e.g.*, Joint Comments of the Motion Picture Ass'n of Am., et al., at 1; Comments of the Nat'l Music Pubs. Ass'n, at 5; Comments of Verizon, at 1-5.

interactive computer services, unfettered by Federal or State regulation."[30] Consistent with Congressional intent, the Commission has generally refrained from regulating the Internet and ISPs, and as a result the Internet has experienced remarkable growth. As the Supreme Court has recognized, if the Internet is to continue to serve as a "unique and wholly new medium of worldwide human communication," then efforts to regulate it must be approached with extreme caution.[31]

This principle applies with particular force here, where the implications of the proposed rulemaking for the Internet have not been fully considered. This proposed rulemaking is "limited" in its scope to digital television and does not expressly apply to the Internet. In fact, the Broadcast Protection Discussion Subgroup, which espoused the broadcast flag standard, did not include WorldCom or other operators of Internet networks, presumably because their concerns were deemed beyond the reach of the rulemaking. Precisely because WorldCom's concerns about the extension of copyright protection rules to the Internet – including whether and to what extent ISPs would be functionally conscripted to police the Internet for copyright infringers – were not considered, the Commission should not seek to regulate Internet networks or ISPs.

Moreover, imposing a "broadcast flag" requirement on ISPs would be a terrible idea. WorldCom and other network service providers generally do not know whether illegal content is carried over their systems, and cannot reasonably be expected to locate the same. We cannot, therefore, be held liable if such content crosses our systems. The sheer amount of traffic carried

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[30] 47 U.S.C. § 230(b)(2).

[31] *Reno v. ACLU*, 521 U.S. 844, 849-54 (1997).

over the Internet and a host of technical limitations make any sort of automatic monitoring of digital broadcasts impossible.

Any and all kinds of content are delivered over the Internet only after being broken down into packets. There simply is no technological way, in real-time, to monitor and analyze all the data packets flowing across any company's network or the public Internet to ferret out illegal broadcasts or other content. The Internet is not a pipe that one can open up at the packet level to monitor movie and sound files floating by. Nor is it possible to place an alarm bell on a network that will ring whenever someone transmits a copyrighted version of the latest movie or network show. No amount of processing power is technically available to examine all traffic on the Internet for illegal content.

Finally, Congress has already enacted legislation regarding ISPs' responsibilities for copyright infringement online. Under Title II of the DMCA, Congress limited the liability of online service providers, while at the same time accommodating the needs of copyright owners to obtain information about online subscribers who are allegedly infringing upon copyrights and protecting the privacy interests of subscribers.[32] Because Congress has already enacted legislation directly related to the obligations of ISPs to protect digital copyrights, and in the absence of express Congressional authorization to extend this rulemaking to the Internet, there is no need for the Commission to extend the reach of its proposed rulemaking into this area.

[32] 17 U.S.C. § 512.

CONCLUSION

For the foregoing reasons, the Commission should decline to promulgate rules or regulations pertaining to digital copyright protection, and in any event should decline to extend any rules growing out of this proceeding to ISPs and Internet network operators.

Respectfully submitted,

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